85-650

NUMBER

Supreme Court, U.S.
FILED
OCT 7 1985
JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

JAMES B. McCORSTIN, JR., on his behalf and behalf of all others similarly situated,

PETITIONERS,

VERSUS

UNITED STATES STEEL CORPORATION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES B. McCORSTIN, JR., PRO SE
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QUESTIONS PRESENTED FOR REVIEW

(I.) Whether a pro-se litigant may represent himself and all others similarly situated in an opt-in class action in an age discrimination case?

(II.) Whether the Court of Appeals for the Eleventh Circuit has rendered a decision sanctioning the action of the district court in denying amendments and dismissing the opt-in class action in this age discrimination case in conflict with the Court of Appeals for the Fifth Circuit which granted it, and calls for an exercise of this Court's power of supervision?

PARTIES TO THE PROCEEDING

1. JAMES B. McCORSTIN, JR., on his behalf and behalf of all others similarly situated. (1)

2. UNITED STATES STEEL CORPORATION (2)

---

(1) W. J. Barrett (deceased), Ruth Christian, Marshall T. Welch, O. V. Canant, Virginia Rogers, Joseph H. Narro, Joseph L. Johnson, Talmadge Taylor, P. J. Zukow, Willard F. Nelson, Robert M. Kirby, Carlton Neugent, John R. Bailey, R. E. Fortner, John R. Armstrong (deceased), Edmond Randle, Thomas H. Franklin, Brice B. Wigginton, W. R. Ling, W. H. Baxley, Mildred S. McCorstin, Clyde R. McBee, Helen B. McKinney, Cecil R. Norrell (deceased), John C. Pugh, Gilbert G. Ritchie, John E. Sadler, Clarence M. Sharp, George T. Storey, Davis H. Thompson, James E. Todd, Laverne R. Matthews.

(2) Subsidiaries of U.S. Steel: Bessemer and Lake Erie Railroad Company; Birmingham Southern Railroad Company; Carnegie Natural Gas Company; Duluth, Missabe and Iron Range Railway Company; Elgin, Joliet and Eastern Railway Company; Navios Corporation; Navios Ship Management Services, Inc.; Ohio Barge Line, Inc.; Percy Wilson Mortgage and Finance Corporation; The Pittsburgh & Conneut Dock Company; RMI Company; Quebec Cartier Mining Company; Union Railroad Company; United States Steel International, Inc.; USS Engineers and Consultants, Inc.; USS Great Lakes Fleet, Inc.; USS Great Lakes Fleet Services; USS Max Tech

Co., Inc.; USS Oilwell Supply Company, Inc.; USS Lake Transport, Inc.; USS Western Hemisphere, Inc.; U.S. Steel Credit Corporation; U.S. Steel Mining Co., Inc.; Warrior & Gulf Navigation Company; Emro Land Company; Marathon Finance Company; Deutsche Marathon Petroleum GmbH; Hancock Shipping Company, Limited; Marathon International Oil Company; Marathon International Petroleum (G.B.) Limited; Marathon International Petroleum Supply Company; Marathon Marine, Inc.; Marathon Oil Company; Marathon Oil North Sea (G.B.) Limited; Marathon Oil U.K., Ltd.; Marathon Petroleum Angola, Ltd.; Marathon Petroleum Australia, Ltd.; Marathon Petroleum Company; Marathon Petroleum Company (Norway); Marathon Petroleum Egypt, Ltd.; Marathon Petroleum Indonesia, Ltd.; Marathon Petroleum Ireland, Ltd.; Marathon Petroleum Kenya, Ltd.; Marathon Petroleum Libya, Ltd.; Marathon Petroleum Norte Brazil, Ltd.; Marathon Petroleum Syria, Ltd.; Marathon Petroleum Tunisia, Ltd.; Marathon Pipe Line Company; Pan Ocean Energy Company; Pan Ocean Oil Corporation (Abu Dhabi); USS Portfolio, Inc.

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REFERENCE TO OPINIONS BELOW

This action involves opinions in two suits in the United States Court of Appeals for the Fifth Circuit and the opinion of the United States Court of Appeals for the Eleventh Circuit in the instant action. The opinions are as follows:

McCorstin v. United States Steel Corp., Appeal No. 79-3593 (5th Cir. unpublished June 10, 1980) AFFIRMED. The assigned file number in district court is CA 79M0535 S.

McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. July 16, 1980) REVERSED AND REMANDED. The assigned file number in district court is CA 74H100 S.

McCorstin v. United States Steel Corp., Appeal No. 79-3593 (5th Cir. unpublished September 5, 1980), motion for clarification GRANTED.

McCorstin v. United States Steel Corp., Appeal No. 84-7422 (11th Cir. unpublished 1985) AFFIRMED. The assigned file number in district court is CA 74 PT0100 S.

McCorstin v. United States Steel Corp., Appeal No. 84-7422 (11th Cir. unpublished 1985) suggestion for rehearing en banc DENIED July 8, 1985.

STATEMENT OF JURISDICTION

On January 31, 1974, James B. McCorstin, Jr. timely filed a class action suit in the United States District Court for the Northern District of Alabama. The defendant is the United States Steel Corporation. The assigned file number in the district court is CA 74H100 S. This suit involved a variety of claims under the Age Discrimination in Employment Act. After a directed verdict in favor of the defendant, McCorstin appealed to the United States Court of Appeals for the Fifth Circuit. (Case No. 78-1957)

On May 15, 1979, McCorstin, as the representative party on his behalf and behalf of 20 others similarly situated timely filed an opt-in class action suit in the United States District Court for the Northern District of Alabama. The defendant is the United States Steel Cor-

poration. The assigned file number in the district court is CA 79M0535 S. This suit involved a variety of claims, including willful and continuing violations of the Age Discrimination in Employment Act. On August 20, 1979, by way of a Memorandum Opinion, the district court entered summary judgment in favor of the defendant. McCorstin appealed to the United States Court of Appeals for the Fifth Circuit and under date of June 10, 1980, a panel of the court of appeals affirmed that ruling. (Case No. 79-3593)

On July 16, 1980, a panel of the United States Court of Appeals for the Fifth Circuit reversed and remanded Case No. 78-1957 for additional discovery and a jury trial.

McCorstin filed a motion for clarification on the rulings in Case No. 79-3593 and under date of September 5, 1980,

the United States Court of Appeals for the Fifth Circuit granted the motion ruling:

> "In affirming the summary judgment entered in CA 79M0535 S, we did not anticipate or know of the forthcoming reversal.
>
> Since it is now clear that the parties have been returned to the trial court for additional discovery and a jury trial, all claims should be resolved in that proceeding. Under these circumstances, we do not vacate our earlier rulings, but manifest justice requires a modification and clarification. Nothing contained in the rulings in this matter shall operate with prejudice against the appellant, McCorstin, as to any amendments he may propose to his pleadings in CA 74H100 S. Multiple suits are not necessary nor desirable."

The United States Court of Appeals for the Eleventh Circuit has established by its rulings in Bonner v. City of Prichard 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), that decisions of the former Fifth Circuit handed down prior to October 1, 1981 are binding precedent.

However, McCorstin has filed numerous motions to amend and/or consolidate

the two suits into one opt-in class action under section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 216(b) and the United States District Court for the Northern District of Alabama has denied the class action and dismissed all those similarly situated without a trial by jury.

On March 16, 1984, three days prior to trial, the trial court ordered that,

> "No evidence relating to layoffs, retirements, etc. of defendant's employees will be allowed except for the period 1968-1975."

The trial court, in direct conflict with rulings of the Fifth Circuit, denied McCorstin and all others similarly situated - right to trial by jury of all their claims, ignored the rulings by the Eleventh Circuit in Bonner, concealed evidence of criminal acts and violations of the Age Discrimination in Employment Act, intentionally omitted violations in its

instructions to the jury, and its actions have been so sanctioned by the Eleventh Circuit as to call for an exercise of this Court's power of supervision.

The United States District Court for the Northern District of Alabama denied McCorstin the right to present newly discovered evidence of a pattern and practice of discrimination held by this Court to be impermissible in Memphis Fire Department v. Carl W. Stotts, 52 LW 4767 (U.S. June 12, 1984), reversed 679 F.2d 541 (CA6 1982) and was sanctioned by the United States Court of Appeals for the Eleventh Circuit.

McCorstin and twenty-six others similarly situated, as of the date of the trial and having met all statutory prerequisites, had charges of additional violations of age discrimination against the United States Steel Corporation time-

ly filed with the Commissioner of the Equal Employment Opportunity Commission. The above and other charges, including consents to sue, were within the statute of limitations and were filed in the district court in this action, and are yet unresolved and the petitioner and all others similarly situated have been denied the right to trial by jury by the district court and so sanctioned by the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit has effectively ruled that a pro se litigant does not have a right to represent himself and all others similarly situated in an age discrimination suit, in conflict with provisions of the Fair Labor Standards Act of 1938 and the Age Discrimination in Employment Act of 1967; and has thereby denied petitioner and all others similarly

situated the right to a fair trial by jury and this important question of law should be settled by this Honorable Court.

Petitioner invokes the jurisdiction of this Honorable Court pursuant to Rules 17.1(a) and 17.1(c) of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED

FAIR LABOR STANDARDS ACT OF 1938, CHAPTER 8, TITLE 29 U.S.C. § 216(b)

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, CHAPTER 14, TITLE 29 U.S.C. §§ 623(a), (e), (f)(2), 626(b), (c), (d)(1), (e), 627, 630(a), (b), (f), 631(a)

(TEXT SET FORTH IN THE APPENDIX)

STATEMENT OF THE CASE

By letter of August 18, 1982, to some sixty-five Fairfield Works employees, Thomas S. Litras, General Manager-Personnel, responding for J. Bruce Johnston, Senior Vice President-Employee Relations, United States Steel Corporation stated:

> "We have not changed our policies and procedures as they concern Management Associates. We have consistently kept employees in this group working full time, even when they were called Management Trainees and classified as non-exempt. While you may not agree, it is vital to the continued health of U. S. Steel that we maintain our sources for future managers. Our experience has taught us that to do otherwise is a short-term expedient with negative long-term effects. We cannot repeat the mistakes of the past as they regard the recruitment and placement of new college graduates."

This newly discovered evidence of a policy and practice of age discrimination was obtained within the authorized discovery period by deposition of Phoebe D. Tindle.

The petitioner, James B. McCorstin,

Jr., was born February 24, 1920 and employed by United States Steel Corporation (hereinafter, "U.S. Steel") on July 15, 1947 as a nonexempt excluded employee. On January 31, 1972, McCorstin was forced into layoff, which was effectively a forced retirement. He was given over a month's gratuity pay and four weeks vacation pay through March 31, 1972.

On June 28, 1972, McCorstin filed a written notice of intent to sue with the Secretary of the United States Department of Labor (hereinafter, "Secretary") against U.S. Steel for willful violations of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621, et seq.) (hereinafter, "ADEA" or "Act")

On August 28, 1972, McCorstin filed with the Secretary a charge of continuing and willful violation of the ADEA by U.S. Steel against its exempt and nonexempt excluded employees in the protected age

group.

On January 31, 1974, McCorstin timely filed a class action suit in the United States District Court for the Northern District of Alabama. The defendant is U.S. Steel. The assigned file number in the district court is CA 74H100 S. The suit involved a variety of claims of willful violations under the ADEA. The district court took jurisdiction and, prior to completion of discovery, dismissed the opt-in class action, intervenors and those that had filed a written consent to sue in the district court.

After a directed verdict in favor of the defendant, McCorstin appealed. On July 16, 1980, a panel of the United States Court of Appeals for the Fifth Circuit reversed and remanded for additional discovery and a jury trial, cited as McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. July 16, 1980)

(hereinafter, "McCorstin I").

On November 12, 1976, James B. McCorstin, Jr., W. J. Barrett, Ruth Christian, Marshall T. Welch, O. V. Canant, Virginia Rogers, Joseph H. Narro, Joseph L. Johnson, Talmadge Taylor, P. J. Zukow, Willard F. Nelson, Robert M. Kirby, Carlton Neugent, John R. Bailey, R. E. Fortner, John R. Armstrong, Edmond Randle, Thomas H. Franklin, Brice B. Wigginton, W. R. Ling and W. H. Baxley timely filed with the Secretary a notice pursuant to Title 29, Sec. 626(d) of intent to sue U.S. Steel as a class action and in the alternative, of intent to amend and/or intervene in the civil action presently pending. The Secretary attempted to resolve the matter through the conciliation process but was unsuccessful.

On May 15, 1979, McCorstin, as the

representative party on his behalf and behalf of all others similarly situated, timely filed in the United States District Court for the Northern District of Alabama an opt-in class action suit under Sec. 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 216(b) and the ADEA. The defendant is U.S. Steel. The assigned file number in district court is CA 79M0535 S. The suit involved a variety of claims, including continuing and willful violations of the ADEA. The district court took jurisdiction of the opt-in class action and on August 20, 1979, by way of a Memorandum Opinion, entered summary judgment in favor of the defendant. McCorstin appealed. The United States Court of Appeals for the Fifth Circuit took jurisdiction and under date of June 10, 1980, a panel of the court affirmed the decision.

McCorstin filed a motion for clarification. Under date of September 5, 1980, the motion was granted by the United States Court of Appeals for the Fifth Circuit ruling:

> "In affirming the summary judgment entered in CA 79M0535 S, we did not anticipate or know of the forthcoming reversal.
>
> Since it is now clear that the parties have been returned to the trial court for additional discovery and a jury trial, all claims should be resolved in that proceeding. Under these circumstances, we do not vacate our earlier rulings, but manifest justice requires a modification and clarification. Nothing contained in the rulings in this matter shall operate with prejudice against the appellant, McCorstin, as to any amendments he may propose to his pleadings in CA 74H100 S. Multiple suits are not necessary nor desirable." McCorstin v. United States Steel Corp., Appeal No. 79-3593 (5th Cir. Unpublished September 5, 1980) (hereinafter, "McCorstin II."

Numerous motions were filed in district court, since the two rulings by the Fifth Circuit, in an effort to amend "McCorstin I and/or consolidate McCorstin

II with McCorstin I into an opt-in class action so that all claims could be resolved in one proceeding as ordered by the Fifth Circuit in McCorstin II. The district court, in conflict with the rulings in McCorstin II, denied all motions to amend and/or consolidate the suits to allow the action to proceed as an opt-in class action. The district court dismissed all class members, even the twenty class members that jointly established jurisdiction with McCorstin for McCorstin II. James B. McCorstin, Jr. and the twenty other class members have been denied their statutory right to have their claims resolved in an opt-in class action in a trial by jury, and in conflict with rulings by the Fifth Circuit in McCorstin II.

During the authorized discovery period, computer generated lists of manage-

ment employees, which were used as work-sheets, were discovered. These lists were in chronological order by age, the oldest being first on the list. Age, service and total of the two were itemized and identified as points. These are the factors used in determining qualification for retirement. The names of retired employees had a line drawn through their names. Dates of retirements in the future were hand-inscribed beside the names of some of the employees.

The order authorizing the discovery deposition of Phoebe D. Tindle was filed and entered on April 27, 1983 and the deposition taken on May 17, 1983.

On January 3, 1984, McCorstin filed a motion for Judicial notice of McCorstin's class action charge of willful violation of the ADEA by U.S. Steel dated August 19, 1982, a letter of Sep-

tember 15, 1982 acknowledging receipt of the charge by the Equal Employment Opportunity Commission, and letter of November 23, 1982 advising that conciliation had been attempted with the respondent, and charging party is free to proceed in any manner deemed appropriate to protect his interests. McCorstin moved the court to take judicial notice and to order that the suit proceed as an opt-in class action.

On February 9, 1984, the June 1, 1982 affidavit of George Frank Jordan, District Director, Officer in Charge of the Birmingham District Office of the Equal Employment Opportunity Commission, was filed in the district court, which included eleven "notices" of intent to sue and "charges," and twenty-six consents to sue filed by McCorstin and others similarly situated against U.S. Steel

for violations of the ADEA.

On February 21, 1984, the district court overruled McCorstin's motion for judicial notice and motion to order the suit to proceed as an opt-in class action.

Petitioner filed motions for recusal of Judge Robert B. Propst on February 21, 1984 and March 1, 1984 and they were denied on February 24, 1984 and March 6, 1984, respectively.

On March 6, 1984, the United States Department of Labor moved to quash the subpoena issued to Lloyd L. Christopher, Area Director of the Birmingham Wage and Hour Office, and Lyndel L. Erwin, Assistant Area Director of the Birmingham Wage and Hour Office, and attached by certification the "notices of intent to sue" and "charges" filed with the Secretary by McCorstin and twenty others similarly

situated "To insure that these documents are such that Mr. McCorstin can enter them into evidence,..."

On March 8, 1984, the district court ordered that McCorstin, a pro se litigant,

> "...will be allowed not more than a total of 42 hours direct and redirect examination time including the time to call and administer the oath to witnesses and to identify and offer exhibits. It will be up to plaintiff to allocate this time as he sees fit. If he uses the total time before all of his witnesses are called, he will not be allowed to call additional witnesses."

On March 16, 1984, three days prior to trial, the district court ordered:

> "No evidence relating to layoffs, retirements, etc. of defendant's employees will be allowed except for the period 1968-1975."

This order is in conflict with rulings of July 16, 1980 and September 5, 1980 by the Fifth Circuit in McCorstin I and McCorstin II respectively, authorizing additional discovery and a jury trial.

The case went to trial on March 19, 1984 to a jury.

The trial judge directed the court clerk to use a stop watch to record the time used by the parties, mainly to restrict the time allowed the pro se litigant to present his case.

The trial judge refused to allow the plaintiff to interrogate his witnesses and introduce newly discovered evidence outside the restricted time frame of 1968-1975.

Lloyd L. Christopher was ordered not to testify about "notices" of intent to sue and "charges" of violations filed with the Secretary after 1975. The November 12, 1976 notice of intent to sue, timely filed by McCorstin and twenty others similarly situated, was not allowed to be introduced as evidence, nor were any of the other timely filed "notices" and "charges" filed after 1975.

The trial judge withheld the Man-Map Report No. 3155 Age Distribution for Active Exempt Employees (dated 06/18/80) as Court Exhibit 3. This computer generated list is evidence of willful and continuing violation of the ADEA concealed by the court.

The newly discovered evidence in the Thomas S. Litras letter was excluded by the March 16, 1984 order.

The trial judge would not allow the plaintiff to establish the fact that he was only one of a large group of employees forced into early retirement while the young management trainees/management associates were insulated from reduction in force in the difficult economic times.

The plaintiff's witnesses were not allowed to testify concerning the circumstances surrounding their retirements.

The trial judge refused to allow the

plaintiff to introduce critical circumstantial evidence that the defendant's counsel had an adverse ruling in a prior age discrimination suit that he was defending because the plaintiff was not shown to be the most inefficient supervisor, and McCorstin was subsequently listed as the "bottom man" in a group of forty-two supervisors. The trial judge would not allow the evidence to be marked or withheld as a court exhibit.

On March 28, 1984, the trial judge filed a self-serving memorandum for court file to justify the time restrictions placed on the pro se litigant.

On April 6, 1984, McCorstin filed objections to proposed jury instructions for failure of the court to give instructions that comprehended all of the violations of the ADEA that the plaintiff had timely filed with the Secretary in forms

of "notices of intent to sue" and "charges of violations of the Act," and for the biased and prejudicial manner of presentation.

The case went to the jury on April 6, 1984 and on April 9, 1984 the jury returned a verdict for the defendant.

On April 17, 1984, plaintiff filed a motion pursuant to Rule 59 FRCP for relief from judgment and to set the case for a new trial, with exhibits attached.

On May 15, 1984, by way of a memorandum opinion, the court overruled and denied plaintiff's motion for a new trial.

McCorstin filed notice of appeal on June 13, 1984, posted bond in the amount of TWO HUNDRED FIFTY DOLLARS ($250.00), and filed request that the complete record be prepared.

On August 8, 1984, McCorstin filed a

motion for the court to retain the record on appeal for use by the parties for preparing their briefs for the court of appeals. The motion was granted without objection on August 10, 1984.

A certificate of readiness was issued on August 13, 1984 and the certified record on appeal was mailed to the Clerk-United States Court of Appeals for the Eleventh Circuit on January 23, 1985.

On May 29, 1985, the United States Court of Appeals for the Eleventh Circuit affirmed.

On June 13, 1985, McCorstin filed a suggestion for rehearing en banc to resolve the conflicts of the prior rulings by the United States Court of Appeals for the Fifth Circuit in McCorstin I and McCorstin II with the rulings by the United States Court of Appeals for the Eleventh Circuit in the instant action.

McCorstin's suggestion for rehearing was denied by the court of appeals by Order of July 8, 1985.

The judgment of the court of appeals, dated July 24, 1985, affirmed the judgment of the district court.

ARGUMENT

Jurisdiction in the courts below in McCorstin I has never been denied; it has even been stipulated by the defendant and jurisdiction accepted in the Fifth Circuit as well as the Eleventh Circuit, and is the action being presented to this court at the present time. It was reversed and remanded for additional discovery and a jury trial by the Fifth Circuit on July 16, 1980.

On November 12, 1976, twenty-one similarly situated aggrieved persons, including McCorstin, all within the protected age group, timely filed with the Secretary an opt-in class action notice of intent to sue U.S. Steel for willful and continuing violations of the ADEA. No civil action was commenced until over 60 days after the notice of intent to sue was filed. The notice was filed within

180 days after the alleged unlawful practice occurred.

The Secretary received the notice, attempted to resolve the matters through conciliation and was unsuccessful. The claimants were so notified.

Within the statutes of limitation on May 15, 1979, McCorstin, a pro se litigant, as the representative party, on his behalf and behalf of all others similarly situated, filed an opt-in class action under Section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 216(b) and the ADEA. The district court took jurisdiction of the opt-in class action and on August 20, 1979, by way of a Memorandum Opinion, entered summary judgment in favor of the defendant. Jurisdiction was never questioned. McCorstin appealed to the United States Court of Appeals for the Fifth Circuit.

The circuit court took jurisdiction of the opt-in class action and under date of June 10, 1980 a panel of the court affirmed that ruling. There can be no doubt that the courts below took jurisdiction in McCorstin II and rendered rulings.

McCorstin filed a motion for clarification since McCorstin I was reversed and remanded on July 16, 1980.

The Fifth Circuit, without taking any exception to jurisdiction or otherwise, granted the motion on September 5, 1980 and specifically identified the title, "James B. McCorstin, Jr., on his behalf and behalf of all others similarly situated." There can be no doubt that the Fifth Circuit fully comprehended that this was an action brought by a pro se litigant, as the representative party, on his behalf and behalf of all others similarly situated. Their rulings are like-

wise perfectly clear. The ruling stated:

> "In affirming the summary judgment entered in CA 79M0535 S, we did not anticipate or know of the forthcoming reversal.
>
> Since it is now clear that the parties have been returned to the trial court for additional discovery and a jury trial, all claims should be resolved in that proceeding. Under these circumstances, we do not vacate our earlier rulings, but manifest justice requires a modification and clarification. Nothing contained in the rulings in this matter shall operate with prejudice against the appellant, McCorstin, as to any amendments he may propose to his pleadings in CA 74H100S. Multiple suits are not necessary nor desirable." McCorstin v. United States Steel Corp., Appeal No. 79-3593 (5th Cir. Unpublished September 5, 1980)

In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Taking direction from the above rulings by the Fifth Circuit and the Eleventh Circuit, McCorstin filed motions to

amend McCorstin I and/or consolidate McCorstin II with McCorstin I into an opt-in class action. McCorstin and the twenty other aggrieved persons that timely filed a notice of intent to sue have been denied due process of law. McCorstin and all others similarly situated have a statutory right to an opt-in class action and such right has been established by the rulings in McCorstin II.

What is "manifest justice" and what does "Multiple suits are not necessary nor desirable." mean?

The Thomas S. Litras letter of August 19, 1982, in the discovery deposition of Phoebe D. Tindle, makes it perfectly clear what the policies and procedures are at U.S. Steel, and McCorstin was denied the right to present this critical new evidence to the jury.

This Honorable Court in Memphis Fire

Department v. Carl W. Stotts, 52 LW 4767 (U.S. June 12, 1984), reversed 679 F.2d 541 (CA6 1982), ruled that it is discrimination to insulate a group of employees from reduction in force in periods of force reduction in times of economic downturn.

On January 30, 1984, McCorstin filed a motion for judicial notice to bring to the attention of the court: (1) the indisputable fact that he had timely filed a charge dated August 19, 1982 and date stamped "Received Aug 23 1982" by the Equal Employment Opportunity Commission that U.S. Steel continues to willfully practice unlawful discrimination in violation of the ADEA; (2) by letter of September 15, 1982, the Equal Employment Opportunity Commission acknowledged receipt of the charge; (3) by letter of Nov 23 1982 - discontinuance of processing by

the Equal Employment Opportunity Commission as they had engaged in conciliation, been unsuccessful in resolving the matter and that the requirements of Section 7(d) of the Act have been fulfilled and the Charging Party is, therefore, free to proceed in any manner deemed appropriate to protect his interests; and to move the court to order the case to proceed as an opt-in class action.

The August 19, 1982 charge against U.S. Steel stated:

"I. The above named employer continues to willfully practice unlawful discrimination in violation of the Age Discrimination in Employment Act. The employer employs more than 20 employees.

II. The named Respondent gave no position statement in regard to this matter.

III. I believe I have been discriminated against because of my age, 62 years, (date of birth: February 24, 1920), inasmuch as:

1. The employer has and contin-

ues to print notices seeking employment of young persons who are or will be college graduates, and actively recruits these persons to the exclusion of older college graduates. The employer continues to reduce pay and fringe benefits of older management employees and not young management associates in times of force reduction or shut down. The non-exempt excluded are forced into unemployment and/or retirement.

2. The employer has not actively advertised and recruited persons in the protected age group since or before June 12, 1968. It is my belief that this employer has employed young recent college graduates at the above location since it shut down on July 1, 1982, and have forced into retirement or unemployment many older, equally or higher degreed employees.

3. It is my belief that this employer has taken these actions in order to adversely affect the employees in the protected age group and to place the young management associates in positions held by, or could have been held by, the more qualified former employees.

IV. Based upon knowledge and belief, the above named employer willful-

ly violates the Age Discrimination in Employment Act in regard to all employees within the protected age group. I am filing this charge on behalf of all similarly situated persons as a class. I am identifying class as all exempt, and non-exempt excluded salaried employees and former employees of this employer, who at the time of alleged discrimination were at least 40 years of age but less than 70 years of age to date.

V. On 8/19/82 I went to the U.S. Steel employment office and was refused an application for employment, also ADEA Poster partly covered by Works notice."

The above charge, to this date, is a viable charge within the statute of limitations.

On February 21, 1984, the district court overruled the motion for judicial notice and to amend the suit to an opt-in class action.

McCorstin and all others similarly situated have, to this date, been denied a fair trial by jury in an opt-in class action.

The rulings by the United States Court of Appeals for the Eleventh Circuit are in direct conflict with the decisions of the United States Court of Appeals for the Fifth Circuit in McCorstin I and McCorstin II in denying McCorstin and all others similarly situated their statutory and case law right to have all their claims resolved in McCorstin I; and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision.

The district court has avoided the decision of this Court in the Memphis Fire Department case by refusing to allow McCorstin to present newly discovered evidence of a pattern and practice of age discrimination as established by

the Litras letter, and the Eleventh Circuit has so sanctioned the action of the district court, as to call for an exercise of this Court's power of supervision.

The United States Court of Appeals for the Eleventh Circuit, by its rulings, has decided that a pro se litigant may not represent himself and all others similarly situated in an age discrimination suit, and this is an important question of federal law which has not been, but should be, settled by this Court. Title 29 U.S.C. § 216(b) states in part:

> "...An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by <u>any one or more employees for and in behalf of himself or themselves and other employees similarly situated</u>...." (emphasis added)

CONCLUSION

Manifest justice requires that the decision of this Honorable Court shall be that James B. McCorstin, Jr., W. J. Barrett, Ruth Christian, Marshall T. Welch, O. V. Canant, Virginia Rogers, Joseph H. Narro, Joseph L. Johnson, Talmadge Taylor, P. J. Zukow, Willard F. Nelson, Robert M. Kirby, Carlton Neugent, John R. Bailey, R. E. Fortner, John R. Armstrong, Edmond Randle, Thomas H. Franklin, Brice B. Wigginton, W. R. Ling, and W. H. Baxley have met all prerequisites and they and all others similarly situated, by filing a written consent to sue in the district court, have a right to have all their claims resolved in an opt-in class action under provisions of the Fair Labor Standards Act and the Age Discrimination in Employment Act.

Regardless of whether this Honorable Court decides that a pro se litigant may

or may not represent himself and all others similarly situated, the Court should exercise its power of supervision and determine that all persons that have met all statutory prerequisites shall be entitled to an opt-in class action and have all their claims resolved in one suit. Multiple suits are not necessary nor desirable.

WHEREFORE, this Honorable Court should grant a writ of certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

JAMES B. McCORSTIN, JR., PRO SE
1108 50th Street, West
Birmingham, AL. 35208
(205) 785-8872

85-650

NUMBER

Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

JAMES B. McCORSTIN, JR., on his behalf and behalf of all others similarly situated,

PETITIONERS,

VERSUS

UNITED STATES STEEL CORPORATION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

JAMES B. McCORSTIN, JR., PRO SE
1108 50TH. STREET, WEST
BIRMINGHAM, ALABAMA 35208
(205) 785-8872

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7422

JAMES B. McCORSTIN, JR.,

Plaintiff-Appellant,

versus

UNITED STATES STEEL CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

---

(May 29, 1985)

Before VANCE and HATCHETT, Circuit Judges, and LYNNE*, Senior District Judge.

PER CURIAM:

This is an appeal from the district court's judgment conforming to a jury verdict for defendant in an age discrimination case.

*Honorable Seybourn H. Lynne, U. S. District Judge for the Northern District of Alabama, sitting by designation.

In this court the plaintiff contends that: (1) the district court erred in disallowing plaintiff's amendment to include other claims which had been the subject of timely filed notices of intent to sue; (2) the lower court erred in excluding certain evidence; and (3) the district court erred in its instructions to the jury.

From our consideration of the record, briefs and oral argument we conclude that reversible error has not been demonstrated.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED: JULY 8, 1985
SPENCER D. MERCER
CLERK

No. 84-7422

JAMES B. McCORSTIN, JR.,

Plaintiff-Appellant,

versus

UNITED STATES STEEL CORPORATION,

Defendant-Appellee.

- - - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Alabama

- - - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 29, 1985, 11 Cir., 198_, _____F.2d_____).

(July 8, 1985)

Before VANCE and HATCHETT, Circuit Judges, and LYNNE*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DE-

NIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ ROBERT S. VANCE
United States Circuit Judge

*Honorable Seybourn H. Lynne, U. S. District Judge for the Northern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED: JUL 24, 1985
Spencer D. Mercer
Clerk

No. 84-7422

JAMES B. McCORSTIN, JR.,

Plaintiff-Appellant,

versus

UNITED STATES STEEL CORPORATION,

Defendant-Appellee.

- - - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Alabama

- - - - - - - - - - - - - -

O R D E R :

(X) The motion of appellant, James B. McCorstin, Jr. for stay of the mandate pending petition for writ of certiorari is DENIED.

Appellant's motion for clarification

of the opinion of May 29, 1985 and order of July 8, 1985 is DENIED.

/S/ ROBERT S. VANCE
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-7422

D.C. Docket No. 74-0100

JAMES B. McCORSTIN, JR.,

Plaintiff-Appellant,

versus

UNITED STATES STEEL CORPORATION,

Defendant-Appellee.

- - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Alabama

- - - - - - - - - - - - -

Before VANCE and HATCHETT, Circuit Judges, and LYNNE*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court

that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

*Honorable Seybourn H. Lynne, U. S. District Judge for the Northern District of Alabama, sitting by designation.

Entered: May 29, 1985
For the Court: Spencer D. Mercer, Clerk

By: /S/ Miguel J. Cort, Jr.
Deputy Clerk

ISSUED AS MANDATE: JUL 24 1985

DO NOT PUBLISH
U.S. Court of Appeals
FILED: Sep 5 1980
Gilbert F. Ganaucheau
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3593

JAMES B. McCORSTIN, JR., on his behalf and behalf of all others similarly situated,

Plaintiff-Appellant,

versus

UNITED STATES STEEL CORPORATION, a corporation

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

(SEPTEMBER 5, 1980)

Before AINSWORTH, FAY and RANDALL, Circuit Judges.

BY THE COURT:

This matter is before us upon the mo-

tion for clarification filed by appellant. For the reasons stated, the motion is granted.

On January 31, 1974, James B. McCorstin, Jr. filed suit in the United States District Court for the Northern District of Alabama. The defendant is the United States Steel Corporation. The assigned file number in the district court is CA 74H100 S. This suit involved a variety of claims under the Age Discrimination in Employment Act. After a directed verdict in favor of the defendant, McCorstin appealed. On July 16, 1980, a panel of this court reversed and remanded that case for additional discovery and a jury trial. (Case No. 78-1957, opinion dated July 16, 1980 and found at page 7436, slip opinions.)

The complaint giving rise to this proceeding was filed on May 15, 1979, between the same parties, in the same dis-

trict court. The file number assigned is CA 79M0535S. On August 20, 1979, by way of a Memorandum Opinion, the district court entered summary judgment in favor of the defendant. McCorstin appealed. Under date of June 10, 1980, a panel of this court affirmed that ruling.

As stated by the trial judge when ruling in case number CA 79M0535 S,

> "The only new claims that plaintiff has included in this complaint are, first, that defendant has recently failed to post required notice about the Age Discrimination Act and, second, that defendant published an advertisement that was illegal under the Age Discrimination Act."

The trial court ruled that the plaintiff lacked standing to raise these claims. The basis for the court's reasoning was that the final judgment entered in case number CA 79M0535 S was

res judicata as to all other claims raised in CA 79M0535 S and consequently McCorstin lacked a "personal stake" as to these claims. Today that basis does not exist because the final judgment in CA 74H100 S has been reversed.

In affirming the summary judgment entered in CA 79M0535 S, we did not anticipate or know of the forthcoming reversal.

Since it is now clear that the parties have been returned to the trial court for additional discovery and a jury trial, all claims should be resolved in that proceeding. Under these circumstances, we do not vacate our earlier rulings, but manifest justice requires a modification and clarification. Nothing contained in the rulings in this matter shall operate with prejudice against the appellant, McCorstin, as to any amendments he may propose to his pleadings in CA 74H100 S. Multiple suits are not necessary nor desirable.

FILED: Jul 22 1981
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK
ENTERED: Jul 22 1981

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES B. McCORSTIN, JR.,

Plaintiff,

v. Civil Action No.: CV74-PT-0100-S

UNITED STATES STEEL CORP.,

Defendant.

ORDER

In accordance with the Memorandum Opinion contemporaneously entered herewith, it is ORDERED that plaintiff's Motion to Amend Complaint be, and the same hereby is, GRANTED to the extent the amended complaint seeks to allege that defendant failed to post in conspicuous places posters, etc., as required by the Age Discrimination Act, that said motion be, and the same hereby is, DENIED as to any

class allegations, and that said motion be, and the same hereby is, DENIED to the extent it seeks to allege punitive damages.

DONE and ORDERED this 21 day of July, 1981.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

FILED: Jul 22 1981
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
ENTERED Jul 22 1981

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES B. McCORSTIN, JR.,

Plaintiff,

v.

Civil Action No.:
CV74-PT-0100-S

UNITED STATES STEEL CORPORATION,

Defendant.

MEMORANDUM OPINION

This cause, in its seemingly never ending procession to a final disposition on the merits, comes on to be heard on plaintiff's Motion to Amend Complaint in which plaintiff seeks leave to file a Secord Amended Complaint containing several class allegations. The parties have presented oral argument on said motion at a previous motion docket and, pursuant to the court's request at the motion docket,

have submitted additional briefs on the motion.

The court has entirely reviewed this cause, from the initial proceeding before Judge Hancock to the current motion. Having read Judge Hancock's order, the Fifth Circuit's opinion reversing that order (621 F.2d 749 (1980), Chief Judge McFadden's order granting defendant's Motion for Summary Judgment in a companion case (CA79-M-0535-S), and the Fifth Circuit's clarifying order issued after McCorstin I, 621 F.2d 749, the court has concluded that any attempt to amend plaintiff's complaint to assert a class action should be denied. Such an amendment would be immediately subject to a motion to dismiss; the court need not indulge in the futility of allowing the amendment only to dismiss the class allegations upon filing of a motion to dismiss.

DeLoach v. Woodley, 405 F.2d 496, 496-97 (5th Cir. 1968). The Fifth Circuit, in McCorstin I, specifically held that Judge Hancock "was correct" when he denied the motion for a class action. McCorstin I was reversed and remanded for a jury trial on the merits of McCorstin's individual claims. The class issue was foreclosed by McCorstin I. The clarifying order entered in McCorstin II contains nothing to negate that conclusion. In McCorstin II plaintiff filed a complaint which Chief Judge McFadden construed to contain the same allegations as were made in McCorstin I save two claims, that U.S. Steel failed to post required notice about the Age Discrimination Act, and that U.S. Steel published an advertisement that was illegal under the Age Discrimination Act. Nevertheless, Judge McFadden ruled that McCorstin lacked standing to raise the two additional

claims based upon the final judgment entered in Judge Hancock's case. Judge McFadden held that McCorstin I was res judicata on the two additional claims attempted to be raised in McCorstin II. Subsequent to Judge McFadden's ruling in McCorstin II, the Fifth Circuit reversed Judge Hancock's ruling in McCorstin I thereby removing the basis for Judge McFadden's ruling in McCorstin II. The purpose of the Fifth Circuit's clarifying order was, in this court's opinion, to emphasize that nothing said or done in McCorstin II should act to bar "any amendments he may propose to his pleadings in McCorstin I; i.e. any claims barred by Judge McFadden in McCorstin II on the basis of res judicata, or any other claims McCorstin had standing to bring. The Fifth Circuit's clarifying order should not be read, and this court does not so read it, to mean that McCorstin could at-

tempt to re-assert class allegations. Thus, to the extent the Second Amended Complaint seeks to allege class allegations, it is due to be denied.

Since the Fifth Circuit's clarifying Order should be read to mean that plaintiff has the right to amend his complaint to assert any individual claims to save multiple suits, the court has searched the proposed Second Amended Complaint to see what, if any, new claims are alleged. Even though couched in terms of injury to a class, the proposed amendment does assert that the defendant failed to post in conspicuous places posters concerning rights under the Age Discrimination Act, a claim similar to one of the two claims barred in McCorstin II. The amendment should be allowed to the extent it attempts to allege this particular claim.

The proposed amendment also seeks $100 Million in punitive damages. Punitive

damages are not recoverable in a private action brought under the Age Discrimination Act. Murphy v. American Motors Sales Corp., 570 F.2d 1226 (5th Cir.1968). Thus, to the extent the proposed amendment seeks punitive damages, it is due to be denied.

An Order consistent with this Memorandum will be contemporaneously entered.

DONE this 21 day of July, 1981.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

STATUTES INVOLVED

FAIR LABOR STANDARDS ACT OF 1938, CHAPTER 8, TITLE 29 U.S.C. § 216(b)

§ 216. Penalties

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount

as liquidated damages. An action ro recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of eompetent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party

plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, CHAPTER 14, TITLE 29 U.S.C.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preferance, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization -

(2) to observe the terms of a bona fide

seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

(Pub. L. 90-202, §4, Dec. 15, 1967, 81 Stat. 603; Pub. L. 95-256, § 2(a), Apr. 6, 1978, 92 Stat. 189; Pub. L. 97-248, title I, § 116(a), Sept. 3, 1982, 96 Stat. 353.)

AMENDMENTS

1982-Subsec. (g), Pub. L. 97-248 added subsec. (g).

1978-Subsec. (f)(2). Pub. L. 95-256 provided that no seniority system or employee benefit plan require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of the individual.

EFFECTIVE DATE OF 1982 AMENDMENT

Section 116(c) of Pub. L. 97-248 provided that: "The amendment made by subsection (a) [enacting subsec. (g) of this section] shall become effective on January 1, 1983, and the amendment made by subsection (b)[enacting section 1395y(b)(3) of Title 42, The Public Health and Welfare] shall apply with respect to items and services furnished on or after such date."

EFFECTIVE DATE OF 1978 AMENDMENT

Section 2(b) of Pub. L. 95-256 provided that: "The amendment made by subsection (a) of this section [amending subsec. (f)(2) of this section] shall take effect on the date of enactment of this Act, [Apr. 6, 1978], except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938 [section 206(d)(4) of this title]), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act [amending section 631 of this title], the amendment made by subsection (a) of this section [amending subsec. (f)(2) of this section] shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first."

TRANSFER OF FUNCTIONS

All functions vested by this section in the Secretary of Labor or the Civil Service Commission were transferred to the Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, §2, 43 F.R.

19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 626 of this title.

§ 626. Recordkeeping, investigation, and enforcement

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be

deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through in-

formal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such ac-

tion.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed -

(1) within 180 days after the alleged unlawful practice occurred;

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the stat-

ute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

(Pub. L. 90-202, § 7, Dec. 15, 1967, 81 Stat. 604; Pub. L. 95-256, § 4(a), (b)(1), (c)(1), Apr. 6, 1978, 92 Stat. 190, 191; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

AMENDMENTS

1978-Subsec. (c). Pub. L. 95-256, § 4 (a), designated existing provisions as par. (1) and added par. (2).

Subsec. (d). Pub. L. 95-256, § 4(b)(1), substituted references to the filing of a charge with the Secretary alleging unlawful discrimination for references to the filing with the Secretary of notice of intent to sue.

Subsec. (e). Pub. L. 95-256, § 4(c)(1), designated existing provisions as par. (1) and added par. (2).

EFFECTIVE DATE OF 1978 AMENDMENT

Section 4(b)(2) of Pub. L. 95-256 provided that: "The amendment made by paragraph (1) of this subsection [amending subsec. (d) of this section] shall take effect with respect to civil actions brought after the date of enactment of this Act [Apr. 6, 1978]."

Section 4(c)(2) of Pub. L. 95-256 provided that: "The amendment made by paragraph (1) of this subsection [enacting

subsec. (e)(2) of this section] shall take effect with respect to conciliations commenced by the Secretary of Labor after the date of enactment of this Act [Apr. 6, 1978]."

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" and "Commission" were substituted for "Secretary", meaning the Secretary of Labor, pursuant to Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, which transferred all functions vested by this section in the Secretary of Labor to the Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R.1053.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 633 of this title.

§ 627, Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to

effectuate the purposes of this chapter.

(Pub. L. 90-202, § 8, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1. § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" and "Commission" were substituted for "Secretary", meaning the Secretary of Labor, pursuant to Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, which transferred all functions vested by this section in the Secretary of Labor to the Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

§ 630. Definitions

For the purposes of this chapter -

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trust, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each

working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to

be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

(Pub. L. 90-202, § 11, Dec. 15, 1967, 81 Stat. 605; Pub. L. 93-259, § 28(a)(1)-(4), Apr. 8, 1974, 88 Stat. 74.)

REFERENCES IN TEXT

The National Labor Relations Act, referred to in subsec. (e)(1), is act July 5, 1935, ch. 372, 49 Stat. 452, as amended, which is classified generally to subchapter II (§ 151 et seq.) of chapter 7 of this title. For complete classification of this Act to the Code, see section 167 of this title and Tables.

The Railway Labor Act, referred to in subsec. (e)(1), in act May 20, 1926, ch. 347, 44 Stat. 577, as amended, which is classified principally to chapter 8 (§ 151 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see section 151 of Title 45 and

Tables.

The Labor-Management Reporting and Disclosure Act of 1959, referred to in subsec. (h), is Pub. L. 86-257, Sept. 14, 1959, 73 Stat. 519, as amended, which is classified principally to chapter 11 (§ 401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title, and Tables.

For definition of Canal Zone, referred to in subsec. (i), see section 3602(b) of Title 22, Foreign Relations and Intercourse.

The Outer Continental Shelf Lands Act, referred to in subsec. (i), is act Aug. 7, 1953, ch. 345, 67 Stat. 462, as amended, which is classified generally to subchapter III (§ 1331 et seq.) of chapter 29 of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1331 of Title 43 and Tables.

AMENDMENTS

1974-Subsec. (b). Pub. L. 93-259, § 28(a)(1), (2), substituted in first sentence "twenty" for "twenty-five" and, in second sentence, defined term "employer" to include a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, and deleted text excluding from such term a State or political subdivision thereof.

Subsec. (c), Pub. L. 93-259, § 28(a)(3), deleted text excluding from term "employment agency" an agency of a State or po-



litical subdivision of a State, but including the United States Employment Service and the system of State and local employment services receiving Federal assistance.

Subsec. (f). Pub. L. 93-259, § 28(a)(4), excepted from the term "employee" elected public officials, persons chosen by such officials for such officials' personal staff, appointees on policymaking level, and immediate advisers with respect to exercise of constitutional or legal powers of the public office but excluded from such exemption employees subject to civil laws of a State government, governmental agency, or political subdivision.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93-259 effective May 1, 1974, see section 29(a) of Pub. L. 93-259, set out as a note under section 202 of this title.

TRANSFER OF FUNCTIONS

All functions vested by this section in the Secretary of Labor or the Civil Service Commission were transferred to the Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, §2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

CROSS REFERENCES

Industry affecting commerce, see section 402 of this title.

Outer Continental Shelf, see section 1331 of Title 43, Public Lands.

§ 631. Age limits

(a) Individuals at least 40 but less than 70 years of age.

(Pub. L. 90-202, § 12, Dec. 15, 1967, 81 Stat. 607; Pub. L. 95-256, §3(a), (b)(3), Apr. 6, 1978, 92 Stat. 189, 190; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

AMENDMENTS

1978-Subsec. (a). Pub. L. 95-256, § 3 (a), designated existing provisions as subsec. (a) and, in subsec. (a) as so designated, substituted "40 years of age but less than 70 years of age" for "forty years of age but less than sixty-five years of age".

Subsecs. (b), (c), Pub. L. 95-256, § 3 (a), added subsecs. (b) and (c).

Subsec. (d). Pub. L. 95-256, § 3(b)(3), struck out subsec. (d), which related to employees serving under contracts of unlimited tenure at institutions of higher education effective July 1, 1982. See Effective and Termination Dates of 1978 Amendment note below.

Pub. L. 95-256, § 3(a), added subsec. (d).

EFFECTIVE AND TERMINATION DATES OF 1978 AMENDMENT

Section 3 of Pub. L. 95-256 provided that:

"(1) Sections 12(a), 12(c), and 12(d) of the Age Discrimination in Employment Act of 1967, as amended by subsection (a) of this section [subsecs. (a), (c), and (d) of this section] shall take effect on January 1, 1979.

"(2) Section 12(b) of such Act, as amended by subsection (a) of this section [subsec. (b) of this section], shall take effect on September 30, 1978.

"(3) Section 12(d) of such Act, as amended by subsection (a) of this section [enacting subsec. (d) of this section], is repealed on July 1, 1982."

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" was substituted for "Secretary", meaning the Secretary of Labor, in subsec. (c)(2) pursuant to Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, which transferred all functions vested by this section in the Secretary of Labor to the Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 622, 623, 624, 633a of this title; title 5 sections 2302, 7702; title 22 section 3905.

TO THE SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR.

IN RE: Notice pursuant to Title 29, Sec. 626(d) of intent to file civil action, and in the alternative, of intent to amend and/or intervene in civil action presently pending.

1. Come now the following named individuals, separately and severally, and give notice to the Secretary of Labor of the United States (hereinafter referred to as "Secretary") and to the Department of Labor of the United States (hereinafter referred to as "Department") of intent to file civil action against United States Steel Corporation, a corporation (hereinafter referred to as "U.S. Steel") under Chapter 14, Title 29 of the United States Code (age discrimination in employment); or, in the alternative, of intent to amend and/or intervene in the case of James B. McCorstin, Jr., et al. v. U. S. Steel, C.A. 74-H-100-S, in the United States District Court for the Northern

District of Alabama, Southern Division:

W. J. Barrett
725 Oakland Drive
Fairfield, Alabama 35064

Ruth Christian
6001 Court H
Birmingham, Alabama 35228

Marshall T. Welch
Suite 201, 3100 Lorna Road
Birmingham, Alabama 35216

O. V. Canant
1005 Second Ave., Pleasant Grove
Fairfield, Alabama 35237

Virginia Rogers
1837 47th Street, Central Park
Birmingham, Alabama 35208

Joseph H. Narro
4401 Avenue H
Fairfield, Alabama 35064

Joseph L. Johnson
5213 7th Court South
Birmingham, Alabama 35212

Talmadge Taylor
Box 64
Mulga, Alabama 35118

P. J. Zukow
801 Avenue K
Lipscomb, Alabama 35020

Willard F. Nelson
2304 Savoy Street
Birmingham, Alabama 35226

Robert M. Kirby
1405 34th Street, Ensley
Birmingham, Alabama 35218

Carlton Neugent
100 Merrywood Drive
Birmingham, Alabama 35214

John R. Bailey
2628 24th Street West
Birmingham, Alabama 35208

R. E. Fortner
4213 Franklin Avenue
Fairfield, Alabama 35064

John R. Armstrong
945 6th Street, Pleasant Grove
Fairfield, Alabama 35127

Edmond Randle
141 Waverly Circle
Bessemer, Alabama 35020

Thomas H. Franklin
917 38th Street South
Birmingham, Alabama 35222

Brice B. Wigginton
1404 5th Avenue West
Birmingham, Alabama 35208

W. R. Ling
640 Park Avenue
Fairfield, Alabama 35064

W. H. Baxley

2. U.S. Steel has its home office at 600 Grant Street, Pittsburgh, Pennsylva-

nia 15230. It is the world's largest steel manufacturer and operates works throughout the country. It has a large works and offices in Jefferson County, Alabama. Each of the above-named individuals (hereinafter referred to as "Claimants") formerly was employed by U.S. Steel, and while between the ages of 40 and 65 years, was discriminated against by U.S. Steel because of age by being coerced to retire before attaining the age of 65 [illegible] accepting a "mutually satisfactory retirement", which, in fact, was unsatisfactory, but the only alternative available in lieu of lay-off without pay tantamount to discharge.

3. On May 18, 1976, there appeared in "The Birmingham News" an advertisement sponsored by U.S. Steel clearly indicating its preference for youthful employees under the age of 40, in direct violation

of Title 29, Sec. 623(e), United States Code. A facsimile of the text of said advertisement is attached hereto as APPENDIX A, and incorporated herein. "The Birmingham News" is a daily newspaper and has the widest circulation of any newspaper in the State of Alabama. Claimants are informed and believe, and upon such information and belief state that similar advertisements appeared in other publications of wide circulation throughout Alabama and the United States at the same time.

4. The above-named individuals intend to file an action against U.S. Steel under Chapter 14 of Title 26, based upon the continuing discrimination practiced by U.S. Steel against them in that neither of them have been offered re-employment by the same despite its recruitment of younger employees to fill similar posi-

tions.

5. The status of the action entitled McCorstin vs. U.S. Steel, supra, is that the District Judge before whom the same is pending has issued an order that the same may not be maintained as a class action, or on behalf of anyone other than the said McCorstin. As an alternative to the action described in Paragraph 4, above, claimants intend to seek to intervene as parties plaintiff in said action (or, as to others who are already named as parties therein, to be reinstated as parties thereto), and, in addition, to seek reconsideration of the order of said District Judge precluding maintenance of the action as a class action.

6. Either alternative (those named in Paragraphs 4 and 5) will be maintained by claimants as a class action on behalf of themselves, and on behalf of all other

persons similarly situated, to-wit: all persons discriminated against by U.S. Steel prior to May 18, 1976, in the manner aforesaid in Paragraph 2, hereof.

/S/ John P. Carlton
JOHN P. CARLTON
Attorney for Claimants

CARLTON, BOLES, CLARK & STICHWEH
903 Frank Nelson Building
Birmingham, Alabama 35203

I certify that a copy of the foregoing has been delivered to the Office of the United States Department of Labor, Wage and Hour and Public Contracts Division, in Birmingham, Alabama, this 12th day of November, 1976; and that copies of the same have been mailed to the Secretary of Labor of the United States in Washington, D.C., and to counsel of record in the case of McCorstin vs. U.S. Steel on the same date.

/S/ John P. Carlton

(Facsimile of Lydia Mitcham
adjacent to advertisement)

"Lydia Mitcham has two things going for her. One is a bachelor's degree in engineering. The other is a master's degree in business.

On second thought, make that three things. She is an American citizen, who is limited only by her ability and initiative.

As a recent graduate of Vanderbilt University and a management trainee at our Fairfield Works, Miss Mitcham has an unlimited future. She is typical of the bright young men and women who are finding challenging and rewarding career opportunities at U.S. Steel.

And she is part of the American tradition which offers every individual an opportunity to realize his or her full potential. We are proud of Lydia Mitcham and the many young men and women like her,

who are an important part of U.S. Steel.

$U_S S$ FAIRFIELD WORKS

UNITED STATES STEEL"

App.A

Supreme Court, U.S.
FILED
NOV 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-650

IN THE

Supreme Court Of The United States

October Term, 1985

JAMES B. McCORSTIN, JR.,
Petitioner

vs.

UNITED STATES STEEL CORPORATION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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INFORMATION REQUIRED BY RULE 28.1

United States Steel Corporation, respondent herein, is a corporation incorporated under the laws of the State of Delaware, and its principal place of business is in Pittsburgh, Pennsylvania. United States Steel Corporation is not a subsidiary of any other company, and all of its subsidiaries are listed below:

1. Bessemer and Lake Erie Railroad Company
2. Birmingham Southern Railroad Company
3. Carnegie Natural Gas Company
4. Duluth, Missabe and Iron Range Railway Company
5. Elgin, Joliet and Eastern Railway Company
6. Navios Corporation
7. Navios Ship Management Services, Inc.
8. Ohio Barge Line, Inc.
9. Percy Wilson Mortgage and Finance Corporation
10. The Pittsburgh & Conneaut Dock Company
11. RMI Company
12. Quebec Cartier Mining Company
13. Union Railroad Company
14. United States Steel International, Inc.
15. USS Engineers and Consultants, Inc.
16. USS Great Lakes Fleet, Inc.
17. USS Great Lakes Fleet Services
18. USS Max Tech Co., Inc.
19. USS Oilwell Supply Company, Inc.
20. USS Lake Transport, Inc.
21. USS Western Hemisphere, Inc.
22. U.S. Steel Credit Corporation
23. U.S. Steel Mining Co., Inc.
24. Warrior & Gulf Navigation Company
25. Emro Land Company
26. Marathon Finance Company
27. Deutsche Marathon Petroleum GmbH
28. Hancock Shipping Company, Limited
29. Marathon International Oil Company

30. Marathon International Petroleum (G.B.) Limited
31. Marathon International Petroleum Supply Company
32. Marathon Marine, Inc.
33. Marathon Oil Company
34. Marathon Oil North Sea (G.B.) Limited
35. Marathon Oil U.K., Ltd.
36. Marathon Petroleum Angola, Ltd.
37. Marathon Petroleum Australia, Ltd.
38. Marathon Petroleum Company
39. Marathon Petroleum Company (Norway)
40. Marathon Petroleum Egypt, Ltd.
41. Marathon Petroleum Indonesia, Ltd.
42. Marathon Petroleum Ireland, Ltd.
43. Marathon Petroleum Kenya, Ltd.
44. Marathon Petroleum Libya, Ltd.
45. Marathon Petroleum Norte Brazil, Ltd.
46. Marathon Petroleum Syria, Ltd.
47. Marathon Petroleum Tunisia, Ltd.
48. Marathon Pipe Line Company
49. Pan Ocean Energy Company
50. Pan Ocean Oil Corporation (Abu Dhabi)
51. USS Portfolio, Inc.

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No. 85-650

IN THE

Supreme Court Of The United States

October Term, 1985

JAMES B. McCORSTIN, JR.,
Petitioner

vs.

UNITED STATES STEEL CORPORATION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, James B. McCorstin, Jr., commenced this action against the respondent, United States Steel Corporation, by filing a complaint in the United States District Court for the Northern District of Alabama on January 31, 1974. (*McCorstin* I). Plaintiff alleged he had been laid off in a reduction-in-force, effective March 31, 1972, and subsequently retired in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA" or the "Act").

On April 16, 1974, petitioner filed a First Amended Complaint seeking to add, as additional named plaintiffs, George T. Storey, Orman V. Canant, Willard F. Nelson, and Helen B.

McKinney.[1] Thereafter, respondent filed a motion for partial summary judgment seeking a dismissal of the claims of those four individuals. By order dated December 16, 1974, the court granted respondent's motion. The court found the facts to be undisputed that petitioner's notice of intent to sue dated June 28, 1972 and companion documents which were filed with the Department of Labor did not purport to pursue a claim on behalf of others similarly situated. Accordingly, the court held that the individuals seeking to intervene could not do so because none of them had filed a written notice of intent to sue with the Department of Labor within 180 days after their retirement dates, the latest being November 1, 1972, as required by 29 U.S.C. § 626 (d).[2]

A trial on the merits of petitioner's individual claim commenced on September 21, 1977, and at the close of petitioner's evidence, respondent moved to dismiss this action pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure. The court recessed the trial, but before it ruled on respondent's motion this Court rendered its decision in *Lorillard v. Pons*, 434 U.S. 575 (1978), holding that, because the ADEA provides that it "shall be enforced in accordance with the powers, remedies and procedures" of the Fair Labor Standards Act, 29 U.S.C. § 626 (b), parties in ADEA actions, upon request, are entitled to a jury trial. Because petitioner's jury demand had previously been struck, the district court notified the parties that it was

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[1]Because the ADEA adopts the enforcement provisions of the Fair Labor Standards Act, including § 16 (b), individuals seeking to intervene in an ADEA action are required to affirmatively "opt-in," on an individual basis, by filing a written consent to sue. *See, e.g., Woods v. New York Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1982); *Mistretta v. Sandia Corp.*, 639 F.2d 588, 594-95 (10th Cir. 1980); *Bean v. Crocker Nat'l Bank*, 600 F.2d 754, 759 (9th Cir. 1979); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975). *See generally* 29 U.S.C. §§ 216 (b) and 626 (b).

[2]Petitioner is incorrect in stating in his petition that the opt-in issue was ruled on before he was given an opportunity to conduct discovery relating to that issue. In fact, he was given ample opportunity to conduct discovery on that issue, as evidenced by the six affidavits, a deposition, and over seventy pages of other evidentiary material submitted by petitioner in opposition to the respondent's motion.

considering respondent's motion as one for summary judgment under Rule 56(b), Fed.R.Civ.P., or directed verdict under Rule 50(a), Fed.R.Civ.P. Thereafter, the court granted the motion, and judgment was entered in favor of respondent. Petitioner then appealed.

In 1979, while his appeal was pending in the Fifth Circuit, petitioner filed another action in the district court against respondent. (*McCorstin* II). In that case, petitioner alleged that respondent had violated the Act by (1) forcing him to retire; (2) failing to post the informational notices concerning the ADEA in conspicuous places as required by the Act; and (3) publishing advertisements in the Birmingham News in 1976 expressing its preference for employees under the age of 40 years. Contrary to petitioner's assertion on page 8 of his petition, the complaint filed in *McCorstin* II does not list any additional named plaintiffs, and no one attempted to opt-into *McCorstin* II.

Respondent filed a motion for summary judgment in *McCorstin* II, which was granted by the district court. The court held that the prior decision in *McCorstin* I was *res judicata* as to the retirement/termination claim and that petitioner lacked standing to raise the claims of illegal posting and advertising because he had not been employed by respondent since 1972. Petitioner also appealed the district court's order entered in *McCorstin* II.

On July 16, 1980, the Fifth Circuit rendered its decision in *McCorstin* I, holding that (1) the four purported opt-in plaintiffs could not intervene because none of them filed any timely notices of intent to sue with the Department of Labor and petitioner's notice of intent to sue dated June 28, 1972 and companion documents, and his subsequent negotiations with the Department of Labor, did not purport to include others similarly situated; and (2) a jury issue existed with respect to petitioner's individual claim which required a remand for a jury trial on the merits of that claim. *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980) (*McCorstin* I).

Prior to the Fifth Circuit's decision in *McCorstin* I, a separate panel of the Fifth Circuit, on June 10, 1980, affirmed the

district court's decision in *McCorstin* II. Pursuant to a motion filed by the petitioner, the panel which heard *McCorstin* II entered a clarifying order, stating that "we did not anticipate or know of the forthcoming reversal" in *McCorstin* I. *McCorstin v. United States Steel Corp.*, No. 79-3593 (5th Cir. unpublished 1980) (App. 1E-4E). It is clear, however, that the clarifying order entered in *McCorstin* II did not vacate the prior decision by the district court. The court stated:

> Under the circumstances *we do not vacate our earlier rulings,* but manifest justice requires a modification and clarification. (App. 4E) (emphasis added).

The Fifth Circuit further stated that nothing contained in its ruling in *McCorstin* II (a ruling affirming the district court's decision) would operate with prejudice against the petitioner as to any amendments that might be *proposed* in *McCorstin* I on remand:

> Nothing contained in the rulings in this matter shall operate with prejudice against the appellant, McCorstin, as to any amendments he may propose to his pleadings in CA-74-H-100-S. Multiple suits are not necessary nor desirable. (App. 4E).

On April 15, 1982, petitioner filed a motion in the district court to consolidate this action with *McCorstin* II. The court overruled petitioner's motion on the ground that *McCorstin* II was no longer a viable action and that all allowable claims arising out of *McCorstin* II either had been or would be allowed by amendment in this action.[3] (App. 1F-8F).

One month later, petitioner's fourth attorney filed another motion to amend the complaint and filed and delivered to respondent a list of twenty-nine individuals who desired to opt-

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[3]The court allowed petitioner to amend his complaint in *McCorstin* I to assert that respondent failed to post the notices concerning the ADEA as required by the Act and later granted a motion by petitioner to amend his complaint to assert that respondent published advertisements indicating a preference for young employees in violation of the Act, the remaining claim asserted in *McCorstin* II.

into this action along with a statement of their claims.[4] *This was the first attempt by anyone to opt-into this action since 1974.* On July 9, 1982, respondent filed a response in opposition to petitioner's motion to amend and moved for partial summary judgment on three grounds: (1) the facts were undisputed that the claims of the twenty-nine individuals who sought to opt-into this action were barred by their failure to comply with the 180-day filing requirement contained in § 626(d) of the Act; (2) even if the 180-day filing requirement of the ADEA is analogized to the 180-day filing requirement of Title VII, the facts were undisputed that the claims of the individuals who sought to opt-into this action were nevertheless barred because none of them could have filed a timely notice of intent to sue on August 23, 1976, the date the petitioner, McCorstin, filed his purported "class notice," that notice being the next notice filed by anyone after June 28, 1972 that conceivably could encompass the claims of others;[5] and (3) even if one assumed a willful violation of the ADEA, their claims

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[4]In his List of Parties, petitioner lists thirty-two individuals as unsuccessful intervenors in the district court. He is in error. Three of those individuals, W. J. Barrett, Joseph L. Johnson and James E. Todd, never sought to intervene at any time in the district court.

[5]In Title VII actions, those employees who could not have filed a timely charge of discrimination at the time the named plaintiff filed his charge cannot be represented as class members or intervene in the action as co-plaintiffs. *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 814 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Yates v. Mobile County Personnel Board*, 658 F.2d 298, 299 (5th Cir. 1981); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 472 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). The rationale behind this principle is that the named plaintiff's filing cannot revive claims which are no longer viable at the time of the filing since this would be using a procedural device to expand substantive rights.

It should also be noted that the Carlton notice of intent to sue which was filed with the Department of Labor on November 12, 1976, (App. II-7I), and all the other charges filed by the petitioner after he left the employment of respondent, are of no avail to the individuals who sought to opt-into this action because they too were filed subsequent to the August 23, 1976 notice, and therefore, more than 180 days after the latest of the alleged unlawful employment practices occurred.

were barred by the applicable statute of limitations contained in § 626 (e) of the Act. The motion was granted by the district court on all these grounds on August 24, 1982, and, consequently, petitioner's motion to amend was denied.[6]

After further discovery, which had been ongoing since the remand of *McCorstin* I in 1980, the second trial of this action finally commenced on March 19, 1984 and concluded on April 9, 1984.[7] The jury returned a verdict in favor of the respondent, and petitioner's motion for new trial was overruled on the ground that the jury's verdict "was supported by substantial evidence." Judgment was entered in favor of respondent, and petitioner appealed.

On appeal, the Eleventh Circuit summarily affirmed the judgment of the district court, stating that "[f]rom our consideration of the record, briefs and oral argument we conclude that reversible error has not been demonstrated." (App. 2A). Petitioner's petition for rehearing and rehearing *en banc* was denied on July 8, 1985. (App. 1B-2B).

REASONS FOR DENYING THE WRIT

Petitioner has failed to present any "special and important reasons" for the issuance of a writ of certiorari. Sup. Ct. Rule 17. The decision by the court below is factually sound, based on sound legal principles, and is not in conflict with any deci-

[6]The motion seeking to add these other twenty-nine individuals as parties was the *only* motion to amend that was denied by the district court on remand from the Fifth Circuit. Contrary to petitioner's assertion throughout his petition, all other amendments proposed by petitioner were granted by the district court, and all claims were resolved in one proceeding as ordered by the Fifth Circuit in *McCorstin* II.

[7]At trial petitioner called 55 witnesses and offered 319 exhibits. Not including time for selecting the jury, opening statements, closing arguments, and numerous conferences while the jury was excused, petitioner utilized 53.08 hours in presenting his case while the respondent presented its case in 13.16 hours. Thus, contrary to the assertion in his petition, petitioner was given a full opportunity to present his case, especially in light of the fact that in 1982 and 1983, less than 3% of all employment discrimination trials lasted longer than nine days.

sion of another federal court of appeals or any decision of this Court. The decision below simply does not present any issue of substantial importance warranting consideration by the Court.

A. No Conflict Exists Between The Decisions Of the Fifth And Eleventh Circuits Regarding The Claims Of The Purported Opt-In Plaintiffs.

Petitioner argues that the Court should issue a writ of certiorari because there is a conflict in the decisions of the Fifth and Eleventh Circuits regarding the claims of the twenty-nine individuals who sought to opt-into this action. Petitioner's argument is totally without merit; there is simply no conflict in this case.

The Eleventh Circuit affirmed the decision of the district court that under *any* judicially recognized theory regarding the applicability of the 180-day filing requirement to "opt-in" plaintiffs, the facts were undisputed that the claims of the individuals who sought to opt-into this action were time-barred under § 626(d) of the Act. The court below also affirmed the decision of the district court that even if one assumed a willful violation of the ADEA, the facts were undisputed that the claims of the individuals who sought to opt-into this action were barred by the three-year statute of limitations contained in § 626(e) of the Act. In reaching its holding, the district court relied on prior precedent from the former Fifth Circuit, including *Marshall v. Kimberly-Clark Corp.*, 625 F.2d 1300 (5th Cir. 1980); *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977); and *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975). In fact, the district court and the Eleventh Circuit were bound by these decisions, because in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as precedent all former Fifth Circuit cases submitted or decided prior to October 1, 1981. The Eleventh Circuit and district court followed these former Fifth Circuit decisions in reaching their holdings,

and no contrary decision is cited by petitioner because no such contrary decision exists. Hence, there is no conflict between the two circuits.

Nor is there any conflict between the decision below and the decisions of the Fifth Circuit in *McCorstin* I and II. In *McCorstin* I and II, the issue of whether the twenty-nine individuals who sought to opt-into this action could do so was not presented because the issue did not arise until 1982, two years after the decisions in *McCorstin* I and II were rendered.

Finally, there is no conflict among *any* of the circuits on the "opt-in" issue raised herein by petitioner. The decision by the court below, that under the particular facts of this case, the claims of the individuals who sought to opt-into this action are time-barred under *two* provisions of the ADEA, simply does not present any special and important reason for the issuance of a writ of certiorari.[8]

B. The Other Issues Raised By Petitioner Are Not Issues Of Substantial Importance Warranting Consideration By the Court.

Another reason advanced by petitioner for granting the writ is that the district court abused its discretion at trial in refusing to allow him to introduce evidence regarding events occurring after 1975, particularly the so-called "Litras letter" dated August 18, 1982. Of course, it is well settled that a trial court's rulings on relevancy and admissibility of evidence will not be

---

[8]It appears that petitioner also argues that because he was proceeding *pro se*, the district court and the Eleventh Circuit did not allow him to propose that others similarly situated should be joined as "opt-in" plaintiffs, and did not allow petitioner to represent those individuals. Petitioner is in error, as demonstrated in the Statement of the Case, *supra*. Throughout this proceeding, in the district court and on appeal, petitioner sought to join others, either as additional named plaintiffs or intervenors. These other individuals were not joined as parties, *not* because petitioner was proceeding *pro se* (in fact in both 1974 and 1982, when petitioner sought to join others, he was represented by an attorney), but because their claims were time-barred by *two* separate provisions of the ADEA. Petitioner is not being candid with the Court when he argues otherwise.

disturbed absent a showing of abuse of discretion. *See, e.g., Block v. R. H. Macy & Co., Inc.*, 712 F.2d 1241 (8th Cir. 1983); *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983); *United States v. Gordon*, 634 F.2d 639 (1st Cir. 1980); *United States v. Medel*, 592 F.2d 1305 (5th Cir. 1979). In this action, the Litras letter, which dealt with the treatment of management trainees at respondent's Fairfield Works during the 1982 reduction-in-force, was written in August, 1982, over *ten years* after petitioner was laid off. Thus, the facts underlying petitioner's claim concerning the 1972 reduction-in-force are totally different from the facts underlying the 1982 reduction-in-force.

Moreover, at trial, the court allowed petitioner to introduce all other competent evidence, provided that the evidence related to events occurring between 1968 and 1976, including the complete employment history of all exempt employees employed prior to the 1972 reduction-in-force, as well as the complete employment history of all management trainees employed between 1968 and 1976. From the jury's verdict, one can only conclude that either no pattern of age discrimination was established, or that the petitioner's layoff was unaffected by, or unrelated to, the existence of any such alleged pattern of treatment. For these reasons, and for the additional reason that the Litras letter was ambiguous (in that respondent's policy regarding the treatment of management trainees might have changed between 1972 and 1982), the district court excluded the letter. The court below affirmed this evidentiary ruling, a decision which clearly does not present any issue of substantial importance warranting consideration by the Court.[9]

Finally, petitioner argues that the writ should be granted because the district court abused its discretion at trial in its charge to the jury. This argument by petitioner was raised in the

[9]It is also well settled that whether the evidence is sufficient to support a jury's verdict is an issue that does not merit consideration by the Court. *See, e.g., NLRB v. Hendricks City Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981); *Rudolph v. United States*, 370 U.S. 269 (1962); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

court below and rejected because the trial court's charge placed the issue of discrimination based on age squarely before the jury. Like the other issues raised by petitioner, this final issue does not present any special and important reason for the issuance of a writ of certiorari.

CONCLUSION

In light of the foregoing, this case does not present any issue of substantial importance that merits consideration by the Court. The decision below is not in conflict with any decision of another federal court of appeals or any decision of this Court, and does not otherwise present any "special and important reason" for the issuance of a writ of certiorari. Accordingly, the petition should be denied.

Respectfully submitted,

J. Fredric Ingram

J. Fredric Ingram

F. A. Flowers III

F. A. Flowers, III

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PROOF OF SERVICE

I, F. A. Flowers, III, a member of the Bar of this Court, as counsel of record for respondent herein, United States Steel Corporation, hereby certify that three copies of the above and foregoing Brief in Opposition have been served by United States mail, properly addressed and postage prepaid, upon James B. McCorstin, Jr., 1108 50th Street West, Birmingham, Alabama 35208, on this 4th day of November, 1985.

It is also certified that all parties required to be served have been served.

F. A. Flowers, III

F. A. Flowers, III

Sworn to and subscribed before me
this 4th day of November, 1985.

Susan S. Turner

Notary Public

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

NUMBER 85-650

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES B. McCORSTIN, JR., on his behalf and behalf of all others similarly situated,

PETITIONERS,

VERSUS

UNITED STATES STEEL CORPORATION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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INFORMATION REQUIRED BY RULE 28.1

Information required by this rule is included in petitioner's petition for writ of certiorari.

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ARGUMENT

The respondent's brief in opposition is not in compliance with Rules 22.1, 34.1(h), 34.1(i) and 34.2 of the Supreme Court of the United States and according to Rule 22.1 shall not be accepted because:

(1) it does not contain a summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief, and

(2) it does not contain an argument, exhibiting clearly the points of fact and of law being presented.

The respondent's brief precludes petitioner's compliance with Rule 22.5, which requires that a reply brief be addressed to arguments first raised in the brief in opposition.

However, in the event that the re-

spondent's brief in opposition is accepted, the petitioner would present this argument.

Congress, realizing that the courts were misconstruing the intent of the ADEA notice of intent to sue requirement, changed the ADEA in 1979 to require a charge of unlawful discrimination. The petitioner timely filed a notice of intent to sue on June 28, 1972 and a timely filed class charge of willful violation of the ADEA on August 28, 1972. The class action complaint was timely filed in district court on January 31, 1974. (McCorstin I) On appeal, the 5th Cir. reversed and remanded, holding that the district court abused its discretion in not allowing adequate discovery and a jury trial.

On November 12, 1976, twenty-one similarly situated persons timely filed a class action notice of intent to sue or

in the alternative to intervene in McCorstin I.

On May 15, 1979, McCorstin timely filed an opt-in class action on his behalf and behalf of all others similarly situated, (McCorstin II) (jurisdiction being the November 12, 1976 class notice of intent to sue.) The notice was also filed in McCorstin II stating that they would maintain the action on their behalf and behalf of all others similarly situated or in the alternative to intervene in McCorstin I.

The district court granted U.S. Steel an extension of time in which to answer. Prior to filing an answer, Chief Judge Frank H. McFadden granted summary judgment for U.S. Steel. U.S. Steel never filed an answer and the case never rose to the point of discovery or amendments or the filing of additional consents to sue.

In 1980, the 5th Cir. ultimately granted a motion for clarification in McCorstin II, stating:

> "Since it is now clear that the parties have been returned to the trial court for additional discovery and a jury trial, all claims should be resolved in that proceeding. Under these circumstances, we do not vacate our earlier rulings, but manifest justice requires a modification and clarification. Nothing contained in the rulings in this matter shall operate with prejudice against the appellant, McCorstin, as to any amendments he may propose to his pleadings in CA 74H100 S. Multiple suits are not necessary nor desirable."

It is this ruling, in simple and straight forward language, that authorized additional discovery and directed that all claims in the opt-in class action in McCorstin II be resolved in McCorstin I.

The district court has, in conflict with the rulings of the 5th Cir., dismissed the opt-in class action and denied McCorstin and all others similarly situated their statutory and case law right to have all their claims resolved in an

opt-in class action in McCorstin I, and the 11th Cir. has sanctioned this departure.

McCorstin, a pro se litigant, has been denied his statutory and case law right to represent himself and all others similarly situated in an opt-in class action in an ADEA action (29 U.S.C. § 216 (b) and case law in McCorstin I and McCorstin II). This is a federal question that has not been, but should be, settled by this Honorable Court.

The respondent has claimed that W. J. Barrett, Joseph L. Johnson and James E. Todd never sought to intervene at any time in the district court. W. J. Barrett and Joseph L. Johnson were in the November 12, 1976 class action notice of intent to sue which has been filed in both McCorstin I and McCorstin II. (App. 1I-9I) On September 13, 1982, James E. Todd filed in district court his

written consent to sue in McCorstin I. The petitioner has an original date-stamped, filed duplicate in his possession. Subsequently, and without notification to the petitioner or being informed of the action, the district court lined through "FILED" and hand wrote "Received." This is an abuse of discretion and/or fraud. The consent to sue can be found in the Record preceding page 876.

The respondent claims the Litras letter dealt with the treatment of management trainees at respondent's Fairfield works during the 1982 reduction-in-force, was written in August, 1982, over ten years after petitioner was laid off. Thus, the facts underlying petitioner's claim concerning the 1972 reduction-in-force are totally different from the facts underlying the 1982 reduction-in-force. Nothing could be fur-

ther from the truth. The facts are as follows: First, as pointed out in the Litras letter, U.S. Steel's actions were not confined to the Fairfield Works. The Litras letter reads in part, "...let me emphasize that the changes you refer to in your letter were not confined to Fairfield Works, but do, in fact, affect most of U.S. Steel Corporation." Second, there were no management trainees in 1982; they were management associates. In 1972 they were management trainees. Third, the Litras letter of August 18, 1982 stated:

> "We have not changed our policies and procedures as they concern Management Associates. We have consistently kept employees in this group working full time, even when they were called Management Trainees and classified as non-exempt. While you may not agree, it is vital to the continued health of U.S. Steel that we maintain our sources for future managers. Our experience has taught us that to do otherwise is a short-term expedient with negative long-term effects. We cannot repeat the mistakes of the past as they regard the recruitment and placement of new

college graduates." (emphasis added) Fourth, no management trainee or management associate was laid off due to any reduction-in-force during the period 1968 to August 18, 1982. And, it is this insulation of a group of employees from reduction-in-force that was found impermissible by this Honorable Court in the Memphis Fire Department case. U.S. Steel, by its own statement of policies and procedures, has not and does not have any intention of complying with the provisions of the ADEA. The district court's concealment of the evidence in the Litras letter is sufficient to call for an exercise of this Court's power of supervision.

Additionally, in 1980, the United States Court of Appeals for the Fifth Circuit granted additional discovery and a jury trial in McCorstin I and the "class action" McCorstin II. The court

below repeatedly denied the class action provisions of McCorstin II and the 11th Cir. has sanctioned the action by the district court in conflict with the rulings by the 5th Cir. In the sealed hearing held on July 27, 1983, filed on July 24, 1984, McCorstin reported to the court that he had taped evidence, obtained in 1982, of a conspiracy by U.S. Steel to intimidate his witnesses and to violate the Age Discrimination in Employment Act and the Employee Retirement Income Security Act and for the court to take knowledge of it. On January 3, 1984, McCorstin, in a recorded hearing filed January 19, 1984, reported to the court that he had a current charge with the E.E.O.C. This charge is a class action charge and has not been resolved.

The discovery deposition of Phoebe D. Tindle was filed on March 1, 1984,

which included the Litras letter of August 18, 1982.

On March 16, 1984, three days prior to trial, the court issued an order that "No evidence relating to layoffs, retirements, etc. of defendant's employees will be allowed except for the period 1968-1975" and "No evidence will be allowed with reference to reductions in force, layoffs and retirements occurring after 1975." The clear intention of the court was to conceal the evidence of class-wide violations of the ADEA and the criminal acts of U.S. Steel and to deny McCorstin, and all others similarly situated, their statutory and case law right to have all their claims resolved in one opt-in class action.

The above actions by the district court are more serious than abuse of discretion. They rise to concealment and obstruction of justice.

By plaintiff's motion, the taped evidence of conspiracy was received by the 11th Cir. and ordered to go forward with the case. Fraud has precluded justice in this action.

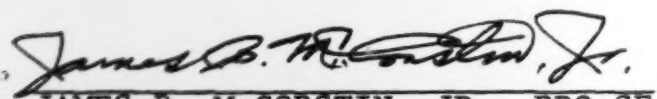
Finally, the rulings by the panel of the 11th Cir. are in conflict with the rulings by the 5th Cir. in McCorstin I and McCorstin II and the en banc rulings by the 11th Cir. in Bonner v. City of Prichard which has held that decisions of the former 5th Cir. handed down prior to October 1, 1981 are binding precedent.

CONCLUSION

There can be no doubt that McCorstin, a pro se litigant, has been denied his statutory and case law right to have all his claims resolved in McCorstin I in an opt-in class action, on his behalf and behalf of all others similarly situated. The decisions of the panel of the 11th Cir. are in conflict with the decisions of the 5th Cir. and the en banc decision of the 11th Cir. and calls for an exercise of this Court's power of supervision.

WHEREFORE, this Honorable Court should grant a writ of certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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